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Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays for writs of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit, in admiralty, reversing and modifying two decrees of the District Court for the Eastern District of New York. In the first suit, the District Court awarded damages to the libelant, Henry DuBois Sons Company, as owner of Scow "D 22", against respondent's motor vessel "Segundo", and dismissed a petition under the 56th Rule in Admiralty against petitioner's steamtug "Ariosa". In the second suit, the District Court dismissed respondent's libel against petitioner's steamtug "Ariosa". The Circuit Court of Appeals, by its decision, held both the steamtug "Ariosa" and the M/V "Segundo" at fault and divided the damages.

The opinion of the Circuit Court of Appeals dated December 23, 1940, is reported in 116 F. (2d) 492 (R. 193) and that of the District Court in 33 F. Supp. 144 (R. 157). A petition for rehearing (R. 198) was denied without opinion (R. 215). The orders for mandate were entered in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit on January 20, 1941 (R. 218). Jurisdiction is based on §240(a) of the Judicial Code, as amended; 28 U. S. Code §347.

Summary.

These cases involve a direct conflict between the decisions of two Circuit Courts of Appeals in interpreting Pilot Rule III of the Supervising Inspectors

in relation to a statute of the United States (33 U. S. Code §203).*

There was a collision in New York Harbor between respondent's motor vessel "Segundo" and a dump scow in tow of the petitioner's steamtug "Ariosa", for which both the "Ariosa" and "Segundo" have been held at fault. The steamtug "Ariosa", with three heavily loaded dump scows in tandem formation on a hawser, was proceeding down the North River on a course to the east of mid-channel; the M/V "Segundo" was proceeding up the North River on a course to the west of mid-channel. The initial courses of the vessels were safely starboard to starboard approximately a quarter mile apart. The material fact is that the "Ariosa" and the M/V "Segundo" were at all times "*green to green*", that is to say, on courses safely to starboard of each other (R. 82). When the "Ariosa" and "Segundo" were almost abreast of one another, the "Segundo" negligently turned to starboard and collided with the tow of the "Ariosa". Fault on the part of the M/V "Segundo" has been conceded throughout.

The relevant statute (33 U. S. Code §203) requires meeting vessels to sound passing signals only if they are approaching in a manner so as to involve "risk of collision". "Risk of collision" is defined in the statute as a situation where each vessel would, in the night time, see both the red and green side lights of the other. The statute specifically prohibits the sounding of passing signals if "risk of collision" does not exist, that is, inter alia, if the green light of one vessel is opposed to the green light of the other, as in the present case.

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* The pertinent provisions of the statute and the Supervising Inspectors' Rules are printed in the appendix.

The Circuit Court of Appeals for the Second Circuit has held in these cases that a passing signal was required by Rule III of the Supervising Inspectors' Rules, despite the statutory prohibition.

The Circuit Court of Appeals for the Third Circuit, in a parallel case, has held the contrary, stating that Rule III of the Supervising Inspectors' Rules must be construed so as to be consistent with the statute.

The Gwynedd, 91 F. (2d) 112.

The conflict in the interpretation of Rule III of the Supervising Inspectors in relation to the statute (33 U. S. Code §203) by two adjoining Circuit Courts of Appeals, if allowed to continue, will result in many collisions with attendant loss of life and damage to property.

Questions Presented.

1. Must not the interpretation of the statutory rules of navigation and of the Supervising Inspectors' rules be uniform throughout the United States?

2. Can the Supervising Inspectors promulgate rules which are inconsistent with the statutory rules of navigation?

Statement.

On December 7, 1938, the steamtug "Ariosa", with a hawser tow of three loaded dump scows, was proceeding down the North River in New York Harbor, and the M/V "Segundo" was proceeding up the North River. The courses of the vessels were such that they would have passed to starboard of one another at a

distance of approximately a quarter of a mile. Without sounding any signal to indicate her intention, the "Segundo" negligently turned to starboard. The master of the "Ariosa" sounded an alarm signal, but the "Segundo" continued her sheer to starboard. The alarm signal was repeated by the "Ariosa". The port anchor of the "Segundo" was then dropped and her engines reversed, but the headway of the "Segundo" could not be checked until she had crossed the towing hawser of the "Ariosa" and come into collision with the first scow.

It was conceded in the pleadings, at the trial and on the argument of the appeal that the "Segundo" was at fault (R. 9, 29, 194). It was contended on behalf of the M/V "Segundo" that the "Ariosa" was likewise at fault for failing to sound passing signals (R. 12).

With respect to this contention the District Court had held that the courses of the two vessels were so far to starboard that the provisions of Article 18, Rule I of the statute (33 U. S. Code 203) prohibited the sounding of a two-blast passing signal (R. 166). The Circuit Court of Appeals, however, has held that although the statute did not require the sounding of a passing signal, Rule III of the Supervising Inspectors' Rules made such a signal obligatory. The Circuit Court said:

> "But, in addition to this statutory rule, we have Pilot Rule III of the Supervising Inspectors * * *, which provides that the passing signals shall be given 'not only when meeting "head and head", or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each

other, and whether passing to the starboard or port'" (R. 195).

The Circuit Court of Appeals then said:

"It is obvious, therefore, that, if the 'Segundo' was to pass the 'Ariosa' starboard to starboard, the passing would be at a distance of not more than a quarter mile, and well within the rule" (R. 196).

The Circuit Court of Appeals for the Second Circuit therefore has held, that a rule of the Supervising Inspectors may be so interpreted by the Court that it repeals or modifies the Inland Rules of Navigation which were enacted by Congress for the stated purpose of preventing collisions. Such an interpretation of a rule of an administrative body should not be permitted to stand, particularly when that rule is capable of being interpreted in a manner entirely consistent with the statute. Obviously, the Supervising Inspectors rules should not be so interpreted as to require the sounding of a signal which the statute prohibits.

This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit. In *The Gwynedd,* 91 F. (2d) 112, the Circuit Court of Appeals had for consideration a parallel situation. With respect to the contention that Rule III of the Supervising Inspectors' Rules requires passing signals to be sounded when there is no "risk of collision", the Court said:

"Rule III, literally construed, would require the signal to be given at one-half a mile whether or not the vessels were in a position of danger

> with respect to one another or not. Rule IV expressly requires a condition of 'risk of collision'. We do not believe, however, that rule III should be so construed as to be inconsistent with rule IV. We think that rule III applies and is intended to apply only where vessels are in a position of danger in respect to one another, and we so hold."

Pilot Rule IV referred to in this decision is the statutory provision (33 U. S. Code 203) whereas Pilot Rule III is a rule of the Supervising Inspectors.

The decision by the Circuit Court of Appeals for the Second Circuit in the present case requires signals irrespective of the existence of the conditions required by the statute. This holding is a departure from earlier decisions in the Second Circuit. In *The John King,* 49 Fed. 469, an analogous situation was presented. There the Circuit Court of Appeals for the Second Circuit said:

> "As we understand the rules of the supervising inspectors, they mean to require steamers at all times, when passing or meeting at a distance within a half mile of one another, to give and answer signals by blasts of the steam-whistle to indicate what course they propose to take; * * *. The rules of navigation enacted by congress are obligatory upon vessels approaching each other from the time necessity for caution begins; and from that time, as the vessels advance, so long as the means and opportunity to avoid danger of collision remain. Until the necessity for precaution begins, obviously, there can be no fault on the part of either vessel,—rules of the inspectors to the contrary notwithstanding,—of which the other can justly complain."

The conflict between the statute and the interpretation placed on Rule III of the Supervising Inspectors' Rules by the Circuit Court of Appeals for the Second Circuit distorts the uniformity of the rules for navigation, which are designed to prevent collision. Uncertainty regarding the rules for navigation is a disturbing condition, which should not be permitted to exist. The decision of the United States Circuit Court of Appeals for the Third Circuit in *The Gwynedd* is entirely consistent with the statutory provisions of 33 U. S. Code, Section 209 (the Inland Rules). The decision of the Circuit Court of Appeals for the Second Circuit in the instant case is inconsistent with the statutory provisions and, if adopted, will lead to hopeless confusion in navigation in inland waters. This is fully discussed in the petition for rehearing, Point II (R. 200) and Point III (R. 206).

The conflict between the decisions of the Circuit Court of Appeals for the Second and Third Circuits is so clear and the seriousness of this conflict is so apparent that it requires no extended discussion. It should be sufficient to state that the master of the "Ariosa" had complied in every respect with the provisions of the statute; that if this suit had been brought in any district court in the Third Circuit, the "Ariosa" would have been exonerated, but that since the suit was brought in the Second Circuit, the "Ariosa" has been held at fault and her owner called upon to pay substantial damages. We believe that the time has come for the clarification of this serious and confusing situation.

Licensed officers of steam vessels are subject to disciplinary action for violation of the rules promulgated for navigation (33 U. S. Code 158; 46 U. S. Code 239). In the present case the master of the "Ariosa" had

complied with the provisions of the statute and yet the Circuit Court of Appeals has found that he violated one of the rules of the Supervising Inspectors. If this be true, the master of the "Ariosa" has become subject to disciplinary action.

On the other hand, if this case had been litigated in the Third Circuit, the master of the "Ariosa" would have been acquitted of any violation of Rule III of the Supervising Inspectors and the claimant of the "Ariosa" would have been exonerated in this action.

Such a conflict in the interpretation of the Supervising Inspectors' Rules is shocking, particularly when the rule can be so interpreted as not to be in conflict with the statute. Rule III is not invalid; it is consistent with the statute if it is read in reference to the statute.

The relation between Rule III and the statute has never been determined by this Court. It is respectfully submitted that the conflict between the Circuits should be considered by this Court.

Reasons for Allowance of Writs.

1. There is a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and the decision of the Circuit Court of Appeals for the Third Circuit in *The Gwynedd*, 91 F. (2d) 112.

2. The licensed officers of steam vessels are subject to the disciplinary action of the Supervising Inspectors for a violation of their rules (33 U. S. Code 158; 46 U. S. Code 239), and so long as the present conflict exists an officer must choose in cases of this kind whether to obey the Inspectors' Rules or to obey

the statute. In either event he risks his license. Uncertainty as to the laws of navigation is not conducive to safety.

3. The case presents an important question of maritime law which has not been decided by this Honorable Court and which should be decided in order to maintain the uniformity of the maritime law of the United States.

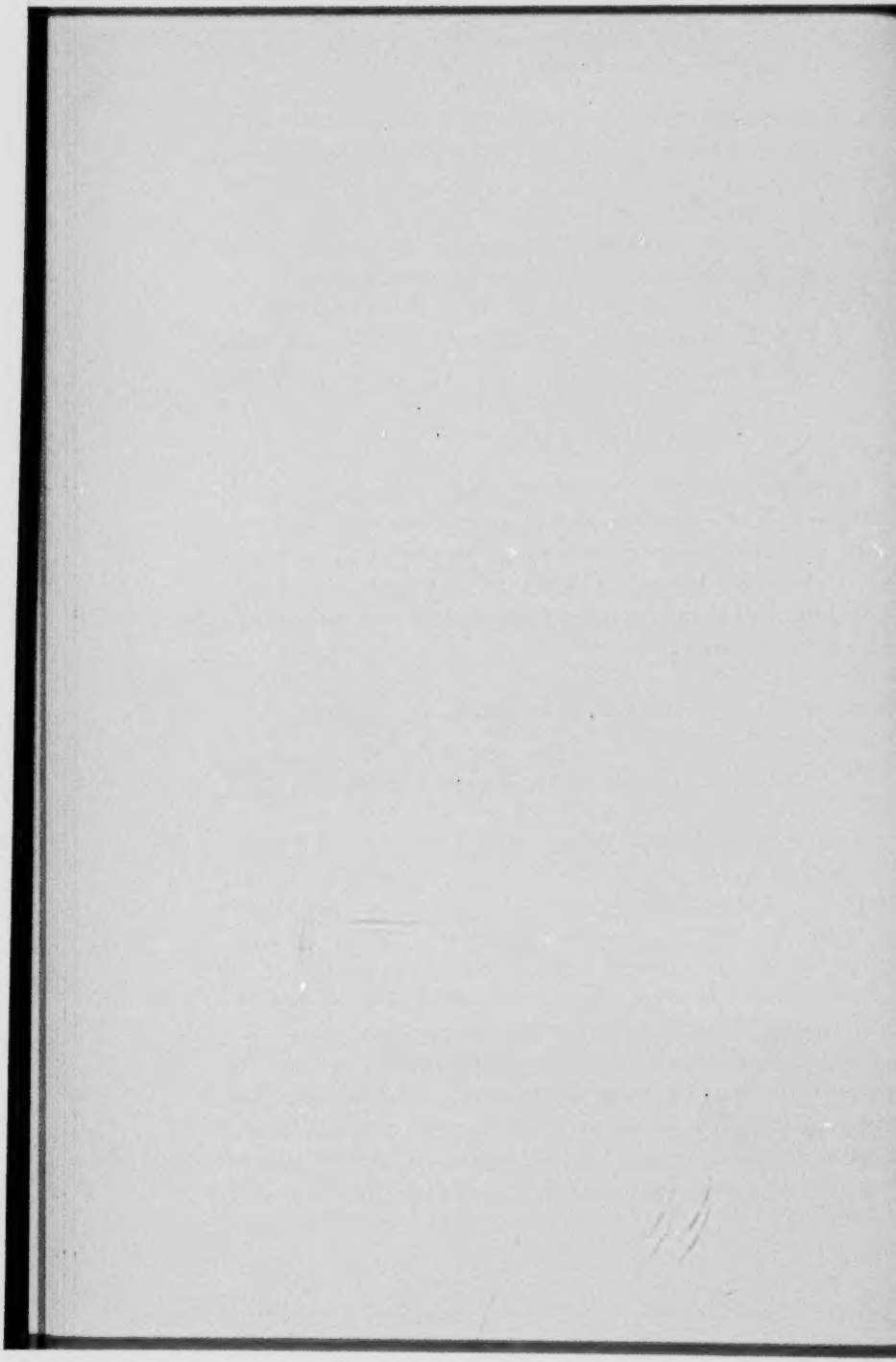
Conclusion.

It is respectfully submitted that this controversy, immediately presenting an important question of maritime law that has not been decided by this Court and on which two Circuit Courts of Appeals now differ, is of such general concern as to merit review by this Honorable Court.

Henry Du Bois Sons Company,

By Charles W. Hagen,
Proctor for Petitioner.

Dated, New York, N. Y., March 17, 1941.



Appendix.

STATUTES.

33 U. S. Code §203.

Art. 18. Rule 1. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which the vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen

ahead, or where both green and red lights are seen anywhere but ahead.

33 U. S. Code §157.

Special rules by inspectors, etc., of steam vessels authorized. The supervising inspectors of steam vessels and the Director of the Bureau of Marine Inspection and Navigation shall establish such rules to be observed by steam vessels in passing each other and as to the lights to be carried by ferryboats and by barges and canal boats when in tow of steam vessels, and as to the lights and day signals to be carried by vessels, dredges of all types, and vessels working on wrecks or other obstructions to navigation or moored for submarine operations, or made fast to a sunken object which may drift with the tide or be towed, not inconsistent with the provisions of this Act (U. S. Code §§154 to 231, inclusive), as they from time to time may deem necessary for safety, which rules when approved by the Secretary of Commerce are declared special rules duly made by local authority, as provided for in Article 30, Chapter 802, Laws 1890 (33 U. S. Code, Section 131). Two printed copies of such rules shall be furnished to such ferryboats, barges, dredges, canal boats, vessels working on wrecks, and steam vessels, which rules shall be kept posted up in conspicuous places in such vessels, barges, dredges, and boats.

Supervising Inspectors' Rules.

Rule III. The *signals for passing,* by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting "head and head", or nearly so, but at all times when

the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port.

The whistle signals provided in the rules for steam vessels meeting, passing, or overtaking are never to be used except when steam vessels are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow, or heavy rainstorms, when vessels can not so see each other, fog signals only must be given.

(13)

APR 14 1941

CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1940

HENRY DUBOIS SONS COMPANY, owner of the Dump Scow D 22 and of the Steamtug Ariosa,
Petitioner,
against
A/S IVARANS REDERI, owner of the Motor Vessel Segundo,
Respondent.

No. 860

HENRY DUBOIS SONS COMPANY, owner of the Steamtug Ariosa,
Petitioner,
against
A/S IVARANS REDERI, owner of the Motor Vessel Segundo,
Respondent.

No. 861

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

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Supreme Court of the United States

OCTOBER TERM, 1940

HENRY DUBOIS SONS COMPANY, owner of the Dump Scow D 22 and of the Steamtug Ariosa, Petitioner, against A/S IVARANS REDERI, owner of the Motor Vessel Segundo, Respondent.	No. 860
HENRY DUBOIS SONS COMPANY, owner of the Steamtug Ariosa, Petitioner, against A/S IVARANS REDERI, owner of the Motor Vessel Segundo, Respondent.	No. 861

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

Statement

The facts are briefly stated in the opinion of the Circuit Court of Appeals (R. 194-5), wherein it appears that the collision in the instant cases occurred on the afternoon of December 7, 1938, in the North River, New York Harbor, between the m/v Segundo and the dump scow D 22, which latter was in tow of the petitioner's tug Ariosa. That the Segundo was in fault had been admitted in her pleadings and she had been held solely at fault by the District Court. The Circuit Court of Appeals found that fault on the part of the Ariosa contributed to the collision, because, although

the master of the tug had the Segundo constantly under observation for a period of some four minutes, during which time he was uncertain as to the Segundo's intended maneuvers and during which time the vessels had been drawing together from 3,000 feet to 500 feet apart, he had blown no whistle signal.

The opinion of the Circuit Court of Appeals states (R. 194):

> "The facts were substantially undisputed; the one issue presented is whether the Ariosa delayed her warning signal too long when danger seemed imminent to escape partial responsibility for the collision."

The Court later in its opinion found (R. 197):

> "It seems to us not in accord with these rules that in the busy North River a vessel may watch another approaching in front of her midstream when the latter's course is not at all understood and refrain from sounding a warning signal of any kind until the intervening space has been reduced from 3000 feet to 500. Had the Ariosa given a starboard passing signal, we should have been disposed to think her justified in so doing. But when she failed to do this, relying on the uncertainty of the Segundo's action, it was surely her duty to give the alarm signal at once, and not to delay either one minute or four minutes. We think her delay was fatal."

The appellate Court having decided that the Ariosa's delay in blowing the alarm whistle contributed to the collision, directed that the damages be divided.

The petition filed wholly ignores the one issue set forth in the decision of the Circuit Court of Appeals and also ignores the grounds given in its opinion. Instead, the petitioner seeks to make it appear that some important question of maritime law is presented, as to which the decision of the Circuit Court of Appeals in the instant case is in conflict with a decision of the Circuit Court of Appeals in the Third Circuit.

POINT I

The Ariosa was in fault for not blowing any timely whistle signal.

Article 18, Rule III of the Inland Rules (33 U. S. Code, § 203), as quoted by the Appellate Court, provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, *from any cause,* the vessel so in doubt shall *immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle" (R. 196).

The four or more blasts of the steam whistle are commonly called the alarm signal, referred to in the opinion of the Circuit Court of Appeals.

It is obvious from the testimony of Captain Sorensen of the Ariosa that this rule applied and his testimony is the basis of the decision of the appellate court.

Captain Sorensen testified that at first he thought the Segundo was going up the North River along the Jersey shore (R. 79, f. 236) and then, as she moved out towards the middle of the river sideways or "crabwise" (R. 70, f. 209), he decided that she was working her way out towards the middle of the river before continuing up to her destination; but he had testified previously before the Local Inspectors, when the matter was fresh in his mind (R. 79, f. 237; R. 196):

> "I had no idea what she was trying to do."

Captain Sorensen had also testified before the Local Inspectors (R. 75, f. 223):

> "Q. As you continued down river did you notice any change of position of the steamer? A. Yes, sir.
> Q. What was that? A. The steamer at first was holding straight up the river, almost parallel to my

> tow. Then she seemed to sag out into the middle of the river and stop and sort of drift and the further I kept coming down river, the more she had a tendency to drift towards me. Her bow slowly came down."

At the trial this testimony was read to Captain Sorensen and he was asked (R. 75, ff. 223-4):

> "Q. When you said her bow came slowly down, you meant it was turning, didn't you, with the tide? A. Yes, it was the tide.
> Q. But her bow was turning out? A. Slowly, yes, sir."

Whether the Segundo was turning towards or was moving "crabwise" towards the course of the Ariosa, she was always drawing closer and despite this Captain Sorensen, who did not know what the Segundo intended to do, testified that he ran from 2,500 to 2,600 feet between the time when he first noticed the Segundo and the time when he sounded the alarm whistle, when the vessels were only 400 or 500 feet apart (R. 70, f. 210; R. 75, f. 225; R. 80, f. 238; R. 194).

Captain Sorensen's failure to blow any whistle signal to the Segundo cannot be excused.

On his own story he had no idea what the Segundo intended to do. She was getting closer all the time (R. 79, f. 237), he spent four minutes (R. 160, f. 479) "trying to figure out what whistle" he could blow (R. 79, f. 237) and found that he "could not figure any way to blow a whistle" (R. 80, f. 239).

The function of the alarm signal was fully discussed in *Merritt-Chapman & Scott Corp.* v. *Texas Corp.*, 98 F. (2d) 719, 721 (C. C. A. 2d). In that case the District Court had held the tug Frank A. Furst in fault for blowing an alarm signal, when in the opinion of the District Judge her master should have understood the course of the Newark. Judge Learned Hand stated that the rule meant what it said, and that a danger signal should be blown if the master failed to understand the course and intention of the other vessel *from any cause.*

POINT II

There is no conflict between the decision of the instant case and the decision of the Circuit Court of Appeals for the Third Circuit.

In *The Gwyned,* 91 F. (2d) 112 at page 113, the Circuit Court of Appeals for the Third Circuit, in interpreting Pilot Rule III, stated:

> "We think that rule III applies and is intended to apply only where vessels are in a position of danger in respect to one another, and we so hold."

In the present case the Circuit Court of Appeals for the Second Circuit held that, as the vessels were approaching each other, there was a position of danger in view of the uncertainty of the master of the Ariosa as to the Segundo's intended maneuvers.

In *Ocean S. S. Co.* v. *United States,* 38 F. (2d) 782 (C. C. A. 2d) at page 784, the Court said:

> "It must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid."

To the same effect, see *The Morristown,* 9 F. (2d) 391 (C. C. A. 2d), where Judge Hough said (p. 392):

> "As we pointed out in The Eli B. Conine, 233 F. 987, 147 C. C. A. 661, negligence is usually error of judgment. The Morristown's master saw plainly what turned out to be a situation of danger; he thought there was no danger, so he went ahead. This is negligence."

In *Chester A. Poling* v. *United States,* 55 F. (2d) 921 (C. C. A. 2d), the Court said (p. 922):

> "Neither vessel had blown any signal. The District Court held the Poling Bros. solely at fault for altering

> her course without signal. * * * Instead of reaching an agreement by signals, each navigator attempted to divine the intention of the other. This has so often been held a mutual fault that the citation of authorities seems almost superfluous. * * * The decree of dismissal must be reversed, and a decree entered holding the respondent liable for one-half the libelant's damages."

In the recent case of *The Trim,* 30 Fed. Supp. 283 (D. C. Mass.), Judge Brewster, an experienced admiralty judge, dealing with a similar situation in which one vessel had been guilty of flagrant fault, said in holding the other jointly liable for delaying the danger signal (p. 285):

> "The fact remains, however, that the captain of the Trim was aware of the erratic course the Exeter was following and must have perceived some time before the collision that a dangerous situation was being created by the mismanagement of the Exeter. It was his duty to take steps to avoid it, if he had time and means to do so."

POINT III

The petition should be denied.

Respectfully submitted,

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